

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102
(415) 557-2325 FACSIMILE (415) 557-0855
www.fehc.ca.gov



MINUTES 479th COMMISSION MEETING

September 30, 2009
Hiram Johnson State Building
455 Golden Gate Avenue, Santa Barbara Room
San Francisco, California

PRESENT:

Chairman George Woolverton, Vice-Chair Patricia Perez, Commissioners Dave Carothers, Stuart Leviton, and Linda Ng; and Commission staff Ann Noel and Cynthia Jones; Commission extern Sarah Monroy; Department of Fair Employment and Housing (DFEH) Director Phyllis Cheng; Deputy Attorney General Nancy Beninati and Department of Justice Extern David Lowry.

OPEN SESSION

Chairman Woolverton moved, Vice-Chair Perez seconded, and the Commission unanimously voted to call the meeting to order at 10:03 a.m. [09-25]

REVIEW OF AGENDA

The Commission accepted the Agenda as submitted.

REVIEW OF THE MINUTES

Executive and Legal Affairs Secretary (ELAS) Ann Noel stated that Commissioner Ng had noted one correction for the minutes: former FEHC Executive Assistant Loc Tra accepted a position with the Department of Justice, not the Commission. Chairman Woolverton moved, Vice-Chair Perez seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 477th Commission meeting as amended. [09-26]

REGULATIONS (10:05 a.m.)

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing. Commissioners are working with staff on each regulatory project.

Pregnancy Regulations: The Commission's revamped fiscal impact statement is with the Department of Finance awaiting review and approval. Once the Department of Finance signs off on this statement, the Commission can begin rulemaking.

Disability Regulations: The Commission's disability regulations subcommittee, Commissioners Perez and Freeman and ELAS Noel, was awaiting changes to the federal Americans with Disabilities Act regulations prior to recommending adoption of the FEHC's disability regulations revisions. The EEOC has now issued those regulations and FEHC staff will incorporate its changes in the Commission's regulations, where applicable. ELAS Noel stated that the EEOC's fiscal analysis of their regulatory changes will be very useful for creating the Commission's fiscal impact statement for the FEHC disability revisions. The disability regulations subcommittee will meet to discuss these changes on October 6, 2009.

The Commission agreed to hold a special telephonic meeting to review and adopt the disability regulations for Tuesday, October 20, 2009 at 10:00 a.m. Thereafter, the Commission will hold its regularly scheduled Commission meeting on Wednesday, November 18, 2009 to review adjudicatory and other rulemaking decisions.

Housing Regulations: Staff continues to make steady progress on new Commission housing regulations, holding regular meetings with the Commission's Housing Working Group to discuss issues and to review draft language. The next meeting of the subcommittee will be October 1, 2009.

LEGISLATION

There was no legislative report.

COMMISSIONERS' REPORTS

Vice-Chair Perez reported that both she and Commissioner Carothers will speak at the State Bar Labor and Employment Section's Annual Meeting, set for October 23-24, 2009, at the Claremont Hotel in Oakland. Commissioner Leviton and ELAS Noel will also attend. Commissioner Perez also participated in a webinar with the California Chamber of Commerce on sexual harassment training recently and she will participate in an event at the Jones Day law firm on October 8, discussing the Commission's regulations.

The Commissioners thanked ELAS Noel for her assistance in preparing Commissioners to speak at various events and for the work she is doing with limited staff.

The Commission discussed the publicity received about the *DFEH v. Acosta Tacos* case and how effective and widespread that publicity has been in discussing the issues in that case. ELAS Noel praised the DFEH for its publicity of Commission decisions and other civil rights issues.

Commissioner Ng reported that the Organization of Chinese Americans in Sacramento will host its annual meeting on hate violence on October 29, 2009, partnering with the Sacramento Unified School District. This meeting will focus on youth, aged 16 to 18, and the program is entitled "Youth Against Hate." Assembly Member Mike Eng will speak.

Commissioner Leviton reported that mediations that he and other Commissioners are doing are going well, but hopes that the Commission will soon see more high impact cases. Chairman Woolverton and ELAS Noel stated that the DFEH has a new grading system to focus its resources on high impact cases so the Commission should soon see this in the cases before it. ELAS Noel thanked the Commissioners for volunteering to do mediations which has been invaluable assistance to staff.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

Personnel:

ELAS Noel discussed how the Commission is addressing its ALJ staffing issues. Presently, ELAS Noel is the Commission's only ALJ hearing cases. Judge Caroline Hunt will be on leave until early January. ELAS Noel reported that she is actively recruiting qualified attorneys for the open administrative law judge position and holds to bring on a new ALJ no later than November. In addition, she is recruiting volunteer attorneys to work with the Commission. A first year attorney with extensive experience with the FEHA will volunteer her time with the Commission for 25 hours per week. ELAS Noel acknowledged and thanked Commissioners for also volunteering to conduct mediations, which has been invaluable to the Commission's adjudicative work load. Finally, the DFEH has been settling most of its cases for the last few months which has greatly assisted FEHC staff with its work load.

Public Education

ELAS Noel distributed copies of an article, "Through Struggle to the Stars: A History of California's Fair Housing Law," that she co-wrote with DFEH Director Phyllis Cheng. The article chronicles 50 years of fair housing law and will be published in the December issue of the State Bar's Real Property Journal.

ELAS Noel directed the Commission to the ELAS Activity Report for the remaining items in that report.

Calendar:

The Commission discussed calendaring for the remainder of the year:

- **October 20 – will be a telephone meeting at 10 a.m. to discuss the disability regulations**
- **November 18 -- Commission meeting in San Francisco with regular agenda**
- **December 8 – meeting is cancelled**

ATTORNEY GENERAL'S REPORT

Deputy Attorney General (DAG) Nancy Beninati reported on the work of the Civil Rights Enforcement Section (CRES) of the Attorney General's (AG) Office.

- The Attorney General has obtained a permanent preliminary injunction for three gangs in the Los Angeles area because they were harassing students near Fremont High School.
- The Attorney General has been successful in requiring landlords to update and to retrofit their housing complexes to allow disability access
- The AG has written an amicus brief on an Armenian – federalism preemption issue

Department of Fair Employment and Housing Director Phyllis Cheng joined the meeting at 11:00 a.m. The Commission took a break until 11:05 a.m.

DEPARTMENT'S REPORT (11:05 a.m.)

DFEH Director Phyllis Cheng gave the Department's report. The DFEH is working with the National Fair Housing Training Academy to produce and to publicize its free seminars on preventing foreclosure and other housing issues in Marina Del Rey and Stockton, starting October 5, 2009.

Cheng distributed to the Commission the DFEH's most recent summary of goals and achievements. The DFEH has instituted case grading for its cases, which has doubled the DFEH's productivity with less staff. Director Cheng reported that the federal Housing and Urban Development (HUD) has increased the DFEH's funding for case processing, by \$3.4 million.

Commissioner Leviton asked Director Cheng to provide more detail about the DFEH's grading system. Director Cheng explained that the DFEH has modeled its grading system after the EEOC's. The EEOC has three categories: Category A – definitely a case; Category B – don't know, are investigated to see if the case is a "C" or an "A"; or Category C – are cases which are not investigated because they have no merit or because the complainant just wants a right-to-sue letter.

The DFEH has a variant of EEOC's system with "A" or "B" cases. If the case is adjudged to be a "B" case, the complainant, will be referred to others who can help, private counsel, small claims court, etc.

Commissioner Leviton asked how the new grading system will impact cases brought before the Commission. Director Cheng explained that the new grading system has been used for only eight months. Commissioner Leviton stated that he worries that the DFEH puts a lot of work into cases affecting only one individual, when perhaps the resources should be devoted to cases which have more impact for more people, class actions, for example. Director Cheng said that the DFEH has reestablished its "special investigations unit" to evaluate and to prosecute class actions. Director Cheng believes with its new system, cases will be better developed and stronger cases brought to the Commission. Director Cheng told the Commission that in the past year, the DFEH has seen a decrease every month in number of complaints filed, both in employment and housing.

The DFEH is increasing its outreach through videos available on the DFEH's website and also on YouTube. The DFEH had previously posted videos on employment topics and now has also posted videos on housing and public accommodation topics including on sexual harassment, disability, screening tenant questions, familial status, and companion animals in public accommodations.

The DFEH is working on quantifying: the worth of affirmative relief, savings to the court system of the administrative adjudicative process; and costs of discrimination.

The DFEH has discussed co-prosecuting cases with the Labor Commission where discrimination cases also have wage issues. The DFEH, Commission staff and the Labor Commission have also discussed working together on seminars on retaliation.

The Commission thanked Director Cheng for her remarks.

PUBLIC COMMENTS

There were no public comments.

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted unanimously 5:0 to end Open Session and to enter Closed Session. [09-27]

The Commission entered Closed Session at 11:31 a.m.

CLOSED SESSION

Only the Commissioners, Commission staff, and Attorney General's staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

Writs and Appeals

Deputy Attorney General Nancy Beninati and ELAS Noel reported on the updated status of the following cases.

(1) DFEH v. Sasco Electric (Scherl)

The case is now published. Respondent is still disputing that it must also pay front pay. This issue thus might be back before the Commission to adjudicate how much front pay is owed. This employment case is being litigated by DAG Antonette Cordero.

(2) DFEH v. Terra Linda Farms (Santillan/Rivas)

The hearing on the writ or mandate will be heard by the Superior Court on October 2, 2009. In addition, the Superior Court has issued an Order to Show Cause why respondent's counsel should not be sanctioned for filing pleadings responding to the Commission's opposition which total 268 pages, rather than the 15 page limit. This employment discrimination case is being litigated by DAG Nancy Beninati.

(3) DFEH v. Michael Hudson (Ford)

Chairman Woolverton moved, Commissioner Carothers seconded and the Commission voted 5:0 to issue a decision on reconsideration which reaffirm its original decision adopting the proposed decision and to make the decision precedential on the effect of the statute of limitations where a guardian has filed a claim on behalf of a minor. [09-28]

(4) DFEH v. Jeannette Prichard (English)

The Commission discussed but took no action on this decision.

(5) DFEH v. Artifer USA, Inc., et al (Anderson)

Chairman Woolverton moved, Commissioner Leviton seconded and the Commission voted 5:0 to adopt the proposed decision and to designate it precedential specifically on two issues: the timeliness of the hearing under Government Code section 12968 absent a signed written waiver from respondent, and the need for businesses to provide effective harassment complaint and redress mechanisms, particularly where the harasser is the employing company's owner, president, or other key decision-maker. [09-29]

ELAS Noel left the room at 11:55 a.m.

(6) DFEH v. Abercrombie & Fitch (Gbajabiamila)

Commissioner Carothers moved, Commissioner Leviton seconded and the Commissioner voted 4:0 to adopt the proposed decision. Chairman Woolverton abstained from voting on this decision. [09-30]

At 12:20 p.m. ELAS Ann Noel rejoined the meeting.

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted 5:0 to adjourn the meeting. [09-31]

ADJOURNMENT

The Commission adjourned its meeting at 12:21 p.m.

Date: September 30, 2009

GEORGE WOOLVERTON
Chairman

ANN M. NOEL
Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS
OF THE 479th COMMISSION MEETING
September 30, 2009
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 09-25 Unanimously called the meeting to order.
- 09-26 Adopted the Minutes and Transactions of the 478th Commission meeting.
- 09-27 Voted to end Open Session and begin Closed Session.
- 09-28 Voted 5:0 to adopt its decision on reconsideration in DFEH v. Michael Hudson (Ford) and to make it precedential on the effect of the statute of limitations where a guardian has filed a claim on behalf of a minor.
- 09-29 Voted 5:0 to adopt the proposed decision in DFEH v. Artifer USA, Inc., et al (Anderson) and to designate it precedential to designate it precedential specifically on two issues: the timeliness of the hearing under Government Code section 12968 absent a signed written waiver from respondent, and the need for businesses to provide effective harassment complaint and redress mechanisms, particularly where the harasser is the employing company's owner, president, or other key decision-maker. .
- 09-30 Voted 4:0 to adopt the proposed decision in DFEH v. Abercrombie & Fitch (Gbajabiamila). Chairman Woolverton abstained from voting on this decision.
- 09-31 Voted 5:0 to adjourn the meeting.

Prepared By

Ann M. Noel
Executive and Legal Affairs Secretary